No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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REPLY BRIEF OF APPELLANT

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Reply to brief of appellee herein will follow appellee's statements as to questions presented which is as follows:

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

ASSIGNMENT OF ERROR NO. 1

This asignment has to do with the sufficiency of the indictment. Appellee claims that every essential element of the offense has been set forth in the indictment. It has been heretofore called to the attention of the Court that the aforesaid indictment does not at any place state that Maricopa County local board No. 6 of the Selective Service System located in Glendale, Arizona, had jurisdiction over the defendant herein. Nor is it shown under the said indictment that the said Selective Service Board followed the laws, rules and regulations and orders of the Selective Service and Training Act of 1940 and Amendments thereto. It is the contention of the defendant that the jurisdiction of the Board and its adherence to the law under which it acted is a necessary part of the indictment to show that an offense was committed.

ASSIGNMENT OF ERROR NO. II AND III

This assignment has to do with the appellant's objections to the admission in evidence of Government's Exhibits No. 7 and 11.

As to Government Exhibit No. 7, which is a letter from Mr. A. M. Tuthill, State Director of Selective Service for the State of Arizona to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona (T. R. 43). The appellant herein reiterates that the said letter was immaterial and its admission was prejudicial to the defendant in that the letter mere-

ly states the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses, known as Bethel Family or as Pioneers, as furnished the local Board by National Headquarters of Selective Service System. It is a contention of the appellant that the method of determining whether or not a member of Jehovah's Witnesses is an ordained minister should properly be in accordance with the Volume 3, Opinion 14 of National Headquarters Selective Service System which states that each case must be determined upon its own merits with due regard to the way in which other members of Jehovah's Witnesses regard the status of the particular member in connection with his ministerial status and that "Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions *must be* determined in each individual case by the local board, *based* upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

Volume 3, Opinion 14, Section 6, Selective Service System of National Headquarters provides as follows:

"In the case of Jehovah's Witnesses as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

We call the Court's attention to the fact that the language of Volume 3, Opinion 14, Section 6 of Selective Service System of National Headquarters signed by Louis B. Hershey, Deputy Director, makes it mandatory that "the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

Here the local Board's decision is based not upon what the National Headquarters of Selective Service System order such findings to be based upon but upon a mere negative finding by A. M. Tuthill, State Director of Selective Service for the State of Arizona, that he does not find Jarmon Thomas Conway's name on a certain list. It is the contention of the appellant that this is in violation of the rules and regulations of the Selective Service System and that the order of the local Selective Service Board is unlawful and void. Consequently, Government Exhibit No. 7 was immaterial and prejudicial to the defendant.

Government Exhibit No. 11 was a letter from James Stokeley, Clerk Board of appeals, Selective Service System to Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, without appearance of Jarmon Thomas Conway, and it is the contention of the appellant that it was immaterial in determining any fact in connection with the case.

ASSIGNMENT OF ERROR NO. IV

It is the contention of the appellant herein that no hearing was ever had that would comply with the laws, rules and regulations of the Selective Service System to determine whether or not appellant was or was not

a duly ordained minister. Volume 3, Opinion No. 14 Section 6 of National Headquarters Selective Service System provides as is set forth in full above that "the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision." The local Selective Service Board failed to heed or to follow Volume 3, Opinion 14, Section 6, of the Selective Service System rules and regulations of National Headquarters of Selective Service System in this instance, and it is the contention of the appellant that orders made for defendant to appear for assignment of work of national importance was unlawful, invalid and void.

The forty-seven (47) affidavits tendered by appelletarian contend to prove the lack of fair hearing by the Board in consideration of proper evidence tendered and offered by appellant and would also prove that the local Selective Service Board No. 6, Maricopa County, Arizona, made their order without sufficient evidence upon which to base said order.

ASSIGNMENT OF ERROR NO. V

This asignment is based upon the contention of the appellant that the Court erred upon denying motion of appeal for directed verdict.

Appellant contends that the local Board found him fit for general service which automatically put appellant under Selective Service Act as an inductee in the combatant forces in the service of the United States, and that he was not therefore subject to the Board ordering him to work in work of national importance.

Robert Earl Hopper vs. United States of America No. 10,110, Dec. 18, 1942, Circuit Court of Appeals for the Ninth District.

Appellant further calls the court's attention to Section 623.51 of Selective Service System Rules and Regulations which provide that:

"After physical examination, the report of the examining physician shall be considered, and the registrant shall be classified in accordance with various subsections of the aforesaid section 623.51 under which under (e) (2) "if registrant has been found to be a conscientious objector to both combatant and noncombatant military service, he shall be classified in Class IV-E."

It is therefore apparent that the classification in 4-E should be a separate finding of the board subsequent to the physical examination of the registrant. The records clearly show that this was not the procedure in this instance.

ASSIGNMENT OF ERROR NO. VI

The Appellant herein claims that the Court erred in refusing to give to the jury the defendant's requested instructions. The appellee contends that the appellant's requested instructions did not correctly state the law, and that the Court did not commit error in refusing to give his instructions to the jury. We respectfully call the Court's attention that each of the said instructions was prepared by following the language of the court in the cases set forth below.

Instruction No. 1 follows the case of Angelus v. Sullivan, 276, Fed. 54.

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Instruction No. 2 follows the case of Ex Parte Stewart, 47 Fed. Supp. 410

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Instruction No. 3 follows the case of Robert Earl Hopper vs. U. S., U. S. C. C. A. for Ninth Circuit No. 10,110.

Instruction No. 4 is a general rule of law that has been developed under the selective service cases.

The Court's instruction as given to the jury is in direct contravention to the rule of law as laid down in the case of St. Joseph Stockyards vs. United States, 298 U. S. 38 wherein the Court said,

> "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That the prospect with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty."

It is the contention of the appellant that it is no violation of Section 311 of the Selective Service and Training Act of 1940 to fail to obey an order which, under the laws, rules and regulations of the Selective Service Act of 1940 the local selective service board had no power to make.

Robert Earl Hopper v. U. S.
U. S. Circuit Court of Appeals
for the Ninth Circuit, No. 10,110.

SUMMARY

The indictment was insufficient.

The court erred in the reception and rejection of evidence.

The court erred in denying the appellant's motion for a directed verdict.

The court erred in instructing the jury.

Respectfully submitted.

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